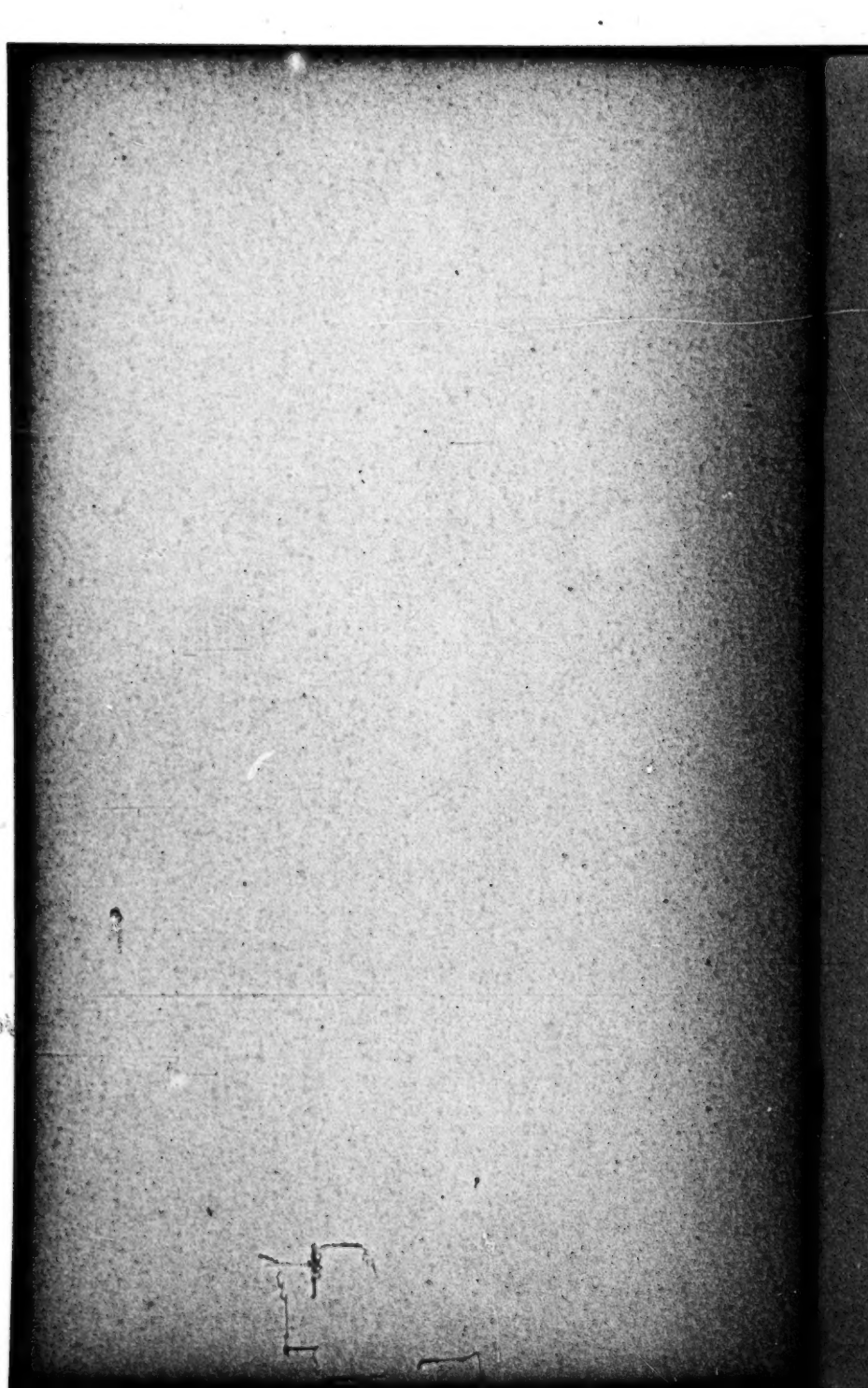

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REPLY BRIEF OF EMPLOYER, PETITIONERS

In The

Supreme Court of the United States

October Term, 1974

No. 74-389

Albemarle Paper Company, et al., *Petitioners*,

v.

Joseph P. Moody, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 7, 1974
CERTIORARI GRANTED DECEMBER 16, 1974

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	
I. Testing	3
A. This Case Is Distinguishable From *Griggs* v. *Duke Power Company* On Its Facts.	3
B. Plaintiffs Did Not Sustain Their Burden Of Proving Adverse Effect, Particularly As To The Revised Beta Examination.	4
C. The Alleged Deficiencies In Albemarle's Test Validation Study Are Based On Guidelines Which Are Irrelevant Under the Circumstances of the Case and Which Are Not Entitled To Deference.	5
D. Conclusion.	8
II. Back Pay	8
A. Introduction	8
B. Respondents' Distrust of Equitable Discretion is Unwarranted.	8
C. Back Pay Decisions Under Other Federal Labor Laws Are Not Dispositive.	12
D. This Case Illustrates The Inherently Speculative Nature Of Back Pay Claims.	13
E. Conclusion.	15
CONCLUSION	16

TABLE OF CITATIONS

Cases

American President Lines, Ltd. v. Federal Maritime Commission, 316 F.2d 419 (D.C. Cir. 1963) 7

Brown v. Board of Education, 349 U.S. 294 (1955) 9

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 3, 4, 7, 8

Page

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 11

Kerotest Mfg. Co. v. C-O Two Fire Equip. Co., 342 U.S. 180 (1952) 9

Lea v. Cone Mills, Inc., 438 F.2d 86 (4th Cir. 1971) 14

Lemon v. Kurtzman, 411 U.S. 192 (1973) 11

Maryland & Va. Milk Prod. Ass'n. v. United States, 362 U.S. 458 (1960) 8

Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941) 12, 13

Quarles v. Philip Morris, 279 F.Supp. 505 (E.D. Va. 1968) 15

Shultz v. Mistletoe Express Serv., Inc., 434 F.2d 1267 (10th Cir. 1970) 12

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 7

United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) 9

United States v. Glaxo Group, Ltd., 410 U.S. 52 (1973) 8

United States v. Local 189 Papermakers, 282 F.Supp. 39 (E.D. La. 1968) 15

United States v. Local 189 Papermakers, 308 F.Supp. 906 (E.D. La.), *aff'd.* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970) 15

United States v. United States Gypsum Co., 340 U.S. 76 (1950) 8

United States v. United States Steel Corp., 371 F.Supp. 1045 (N.D. Ala. 1973) 9, 15

United Steelworkers v. United States, 361 U.S. 39 (1959) 10

Statutes and Regulations

5 U.S.C. § 553 (1970) 7

42 U.C.C. § 2000e-2(h) (1970) 4

42 U.S.C. § 2000e-12(a) (1970) 7

29 CFR § 1607.5(c)(1) (1970) 6

Other Authorities

L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 413 (1970) 5

1 DAVIS, ADMINISTRATIVE LAW §§ 5.03, 5.04 (1958) 7

Note, 84 HARV. L. REV. 1109 (1971) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL., *Petitioners,*

v.

JOSEPH P. MOODY, ET AL., *Respondents.*

REPLY BRIEF OF EMPLOYER PETITIONERS

STATEMENT OF THE CASE

Much of Respondents' Statement of the Case is devoted to issues not before This Court, such as whether there had been past discrimination, as that term is now known, against blacks, and whether the seniority system tended to perpetuate that discrimination. These were matters not contested before the District Court and Albemarle, at least, thought that the District Court had disposed of them finally. Furthermore, the record in this case clearly shows Albemarle's subscription to the idea of equal employment opportunity and its affirmative efforts beginning prior to the effective date of Title VII to achieve it.

Because the total employment at Albemarle's Roanoke Rapids mill has contracted with advancing technology, to freeze the changing employment picture at a particular moment is misleading. Thus the 1967 statistics set forth in the opinion of the District Judge (A. 481-486) and heavily relied upon by Respondents (Brief for Respondents at 8-9) understate the results of Albemarle's good faith affirmative efforts to comply with Title VII's mandate. Despite the contracting work force, the employment status and opportunities for blacks had improved measurably by the time of the 1971 trial.[1]

The Roanoke Rapids mill has provided relatively high paying employment for scores of persons, both black and white, with minimal qualifications. To say that Albemarle has been discriminatorily denying employment opportunities to persons who have "long been qualified" (see Amicus Brief of Lawyers Committee for Civil Rights Under Law at 7) is simply not true. The fact is, of the sixteen class members whose testimony is part of the record herein, not one indicated any qualification for advancement, and in several cases not even any desire therefor.

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[1] See R. 1168-1172; Company Ex. No. 4; and compare the District Court's Conclusion of Law, A. 496:

> "Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated."

with Brief for Respondents at 8.

And compare A. 489:

> "In 1964 prior to the effective date of the Civil Rights Act of 1964, the company began actively recruiting black applicants from the local high schools to apply for the Maintenance Apprenticeship Program. . . . There were five blacks in the program by September of 1967 and as of 1970, ten blacks had entered the program."

with Brief for Respondents at 9.

ARGUMENT

I. Testing

A. This Case Is Distinguishable From Griggs v. Duke Power Company On Its Facts.

Respondents contend that this case is controlled by principles enunciated by This Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) due to a factual similarity between the cases. In truth, the only factual similarity is that both Duke and Albemarle used as parts of their employment selection programs the Wonderlic Test. Aside from this one fact the cases are entirely different. Duke Power Company simply relied on the fact that its tests were "professionally developed" in accordance with the language of the statute. In the instant case, Albemarle implemented its selection processes gradually as the need for better qualified employees arose between the early 1950's and 1963, long before the Act had even been contemplated.[2] The bona fide business need behind these requirements is clear in the record. A. 331-332, 346-349. And, Albemarle has demonstrated here that its testing requirements helped achieve the genuine business need to select employees who could satisfactorily perform increasingly complex jobs. (A. 345).[3] If,

[2] The Beta was adopted after a validation study demonstrated that it correlated positively with successful job performance. Respondents attack this study as inadequate (Brief for Respondents at 24, n. 31). Regardless of the value of this study as proof of job relatedness, the fact that such a study was done indicates that the test was not implemented as an unnecessary obstacle to employment.

[3] In *Griggs*, this Court stated:

> "In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need." 401 U.S. at 432

as this Court stated in *Griggs*, "The touchstone is business necessity," 401 U.S. at 431, then surely Albemarle has met its burden of showing a genuine business need for its selection criteria.

B. Plaintiffs Did Not Sustain Their Burden Of Proving Adverse Effect, Particularly As To The Revised Beta Examination.

Respondents' argument on the issue of the effect of Albemarle's testing requirements on blacks amounts to an effort to substitute testimonial generalities and findings of fact in other forums for factual proof of adverse effect. Respondents' burden under *Griggs* was to prove that the Revised Beta and the Wonderlic, as utilized by Albemarle at its Roanoke Rapids mill were, in the words of the statute, "designed, intended or used to discriminate." 42 U.S.C. §2000e-2(h). Albemarle submits that the record remains devoid of such proof.[4]

Furthermore, the Court of Appeals' injunction was based on a misapprehension. As Albemarle has noted (Albemarle Brief at 44), and as Respondents admit in their brief (Brief

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In the present case, it is clear that Albemarle cannot hire qualified people from the local labor market to fill the highly skilled jobs at the top of its lines of progression. Unless Albemarle can train its own personnel through its functionally related lines (See the District Court's finding of fact number 8 at A. 477), it would eventually be unable to maintain productivity. The business need for Albemarle to require applicants for the lowest level jobs in its skilled lines of progression to possess the qualifications ultimately to reach the highest level jobs is therefore abundantly clear on the record.

[4] The record is particularly lacking in proof as to the impact of the Beta Examination. (See Albemarle Brief at 28-31.) Although questioned extensively, the best Respondents' expert, Dr. Katzell, could say with respect to a disparate effect of the Beta was: "While I don't know of such data specifically on the Beta for sure, I think there is this, but my memory is not clear on this at the moment." (A. 406). Respondents' other expert, Dr. Barrett, was never asked.

for Respondents at 26), the tests have long since been eliminated from many lines of progression. Thus, the actual use of tests which the District Court declined to enjoin was much narrower than the supposed use of tests which the Court of Appeals would enjoin.

C. The Alleged Deficiencies In Albemarle's Test Validation Study Are Based On Guidelines Which Are Irrelevant Under The Circumstances Of The Case And Which Are Not Entitled To Deference.

Respondents argue that Dr. Joseph Tiffin's failure to conduct job analyses led to job performance ratings possibly based on irrelevant factors so that Dr. Tiffin's data and conclusion are unreliable. While Albemarle has touched upon this argument in its initial brief on the merits (See pp. 36-43), the point warrants some further consideration here.

Respondents' argument is based on a premise that there existed "confusion prevalent among the supervisors who rated job performance for validation purposes." (Brief for Respondents at 32). There is absolutely no record support for that premise. Moreover, even if the premise were true, the effect would be the opposite of that suggested by Respondents.

According to authority quoted by Respondents, unreliable job performance ratings tend to *decrease* the likelihood of obtaining significant positive correlations between test scores and the criterion:

> "A test that can predict quality of work will seem to be a poor test if it is judged by a criterion that does not fairly indicate the quality of work. The criterion (or set of criteria) should cover all important aspects of the job." Cronbach, *Essentials of Psychological Testing,* 413 (1970). (Quoted in Brief for Respondents at A2.)

Manifestly the criterion at issue here—rankings in order of overall job performance (A. 175)—covers all important aspects of the jobs. Assuming that there exists reason to believe that the tests measure aptitudes important to successful job performance—and the District Court found a logical nexus between the abilities measured by the tests and the safe and efficient operation of the mill (A. 493-494)—positive correlations between the test scores and unreliable criteria could occur only by chance. Yet Dr. Tiffin's conclusion was based only on correlations which were statistically significant at the level, or higher, suggested by the EEOC. 29 CFR § 1607.5 (c)(1) (1970). (A. 314). Thus, the probability that the correlations Dr. Tiffin relied on could have occurred solely by chance is at most one in twenty.[5] Therefore, Respondents' apparent conclusion that lack of job analyses caused unreliable job ratings which in turn rendered Dr. Tiffin's statistics "unimpressive" (Brief for Respondents at 32-33) has no basis in law, logic or fact.

In any event, the Guidelines relied upon by the Court of Appeals majority and by Respondents[6] in their brief simply have no application to the purpose for which Dr. Tiffin's study was done and under the circumstances surrounding the study. Dr. Tiffin conducted essentially a revalidation study, his criterion was overall job performance, he had extensive experience in the paper industry, and, as Albemarle demonstrated in its initial Brief filed in This Court, racial bias

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[5] It is worthy of note that the correlations obtained in Tiffin's study, when averaged by use of a formula known as Fisher's Z Transformation, yield the following average correlations across all jobs studied: Beta, .314; Wonderlic A, .644; Wonderlic B, .586. For a sample size of 121 employees (the total studied by Tiffin) a correlation as high as .235 could occur solely by chance only in one in 100 times.

[6] The Respondents also rely on standards published by the American Psychological Association which have no application in this case. (See Albemarle Brief n. 35).

among supervisors could not possibly have affected his results. (Albemarle Brief at 42-43).

This Court's general approval of the EEOC Guidelines in *Griggs*, limited to approval of the concept of job relatedness, 401 U.S. at 433-34, cannot be read as having approved all of the many specific technical suggestions contained in the 1970 Guidelines.[7] Albemarle submits that the Court of Appeals' deference to the 1970 Guidelines elevated them to substantive regulations with which an employer must comply in order to sustain its burden of proof. As so construed, the Guidelines are not "suitable procedural regulations to carry out the provisions of this title," 42 U.S.C. §2000e-12(a), and therefore exceed the EEOC's statutory grant of power. It is submitted, therefore, that the Court of Appeals erred in deferring to the Guidelines as controlling in this case.

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[7] The Guidelines were promulgated without the notice and hearing required by Section 4 of the Administrative Procedure Act, 5 U.S.C. §553, because, as the EEOC asserted, they were merely interpretative. The Guidelines therefore lack the force of law, and the degree of deference to be accorded them depends on "the thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). See also *American President Lines, Ltd.* v. *Federal Maritime Commission*, 316 F.2d 419, 421 (D.C. Cir. 1963; Burger, J.). Those factors militate here against deference. The deference decreed by the Fourth Circuit, and urged by Respondents here and the EEOC below is more appropriate to so-called "legislative rules" (see 1 DAVIS, ADMINISTRATIVE LAW §§5.03, 5.04 (1958)); these Guidelines cannot be elevated to that status without observance of the procedures mandated by 5 U.S.C. §553.

D. Conclusion.

If tests are useful, as everyone including this Court (*Griggs, supra,* at 436) seems to agree, this is a clear case where the tests should be upheld.

II. Back Pay

A. Introduction

Respondents concede, as they must, that Congress left the fashioning of appropriate relief in Title VII actions to the equitable discretion of the District Court. (Brief for Respondenets at 55-56). Respondents further concede that the "special circumstances" rule applied by the Court of Appeals panel majority to justify reversing Judge Dupree's discretionary denial of back pay severely restricts the exercise of that discretion. (Brief for Respondents at 53-54). Respondents argue, however, that the "special circumstances" rule is a necessary constraint on the discretion of district courts to grant or deny back pay in Title VII actions. Albemarle disagrees.

B. Respondents' Distrust Of Equitable Discretion Is Unwarranted.

Respondents argue that the "special circumstances" rule is necessary "to eliminate fundamentally inconsistent applications of Title VII." (Brief for Respondents at 53). This argument assumes that appellate courts are unable to provide effective review of discretionary remedial orders, a totally unwarranted assumption. For example, This Court for many years has left the fashioning of effective antitrust relief to the discretion of the district courts while exercising meaningful appellate review.[8]

[8] Compare, *United States* v. *Glaxo Group, Ltd.*, 410 U.S. 52, 64 (1973), and *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950), with *Maryland & Va. Milk Prod. Ass'n.* v. *United States*, 362 U.S. 458, 473 (1960).

Further, Respondents argue that good faith is an unworkable standard for back pay awards and "would assure the district courts an effectively unreviewable discretion." (Brief for Respondents at 62). What Respondents distrust and challenge is the essential characteristic of a court of equity—"a practical flexibility in shaping its remedies and . . . a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education,* 349 U.S. 294, 300 (1955). Respondents' distrust of equitable discretion brings to mind This Court's comment in *Kerotest Mfg. Co.* v. *C-O Two Fire Equip. Co.,* 342 U.S. 180, 185 (1952):

> "Such apprehension . . . reflects an attitude against which we were warned by Mr. Justice Holmes, speaking for the whole Court, likewise in regard to a question of procedure: 'Universal distrust creates universal incompetence.' *Graham* v. *United States,* 231 U.S. 474, 480."

Albemarle agrees with Respondents' general statement, "the district courts have the discretion, and this is the heart of equitable discretion, to formulate relief that will both effectively remedy violations of Title VII and apply fairly to the pertinent employment system." (Brief for Respondents at 55). The issue here is whether that discretion should be shackled by a rule presumptively favoring a particular type of equitable relief—back pay. Of course, as Respondents note, a number of Title VII decrees have employed compensatory relief. But other Title VII courts, equally committed to the purposes of the Act, have found, for example, that broader injunctive relief is more equitable and appropriate than class-wide back pay.[9] To deprive the district courts of

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[9] See *United States* v. *United States Steel Corp.,* 371 F. Supp. 1045, 1063 (N.D. Ala. 1973). The Government has also seen fit in some "pattern or practice" suits not to seek back pay. See, e.g., *United States* v. *Bethlehem Steel Corp.,* 446 F.2d 652, 659 (2d Cir. 1971); Note, 84 HARV. L. REV. 1109, 1243 (1971). In that connection the

this remedial discretion would be fundamentally inconsistent with equity jurisdiction. As Mr. Justice Douglas said in dissent in *United Steelworkers* v. *United States*, 361 U.S. 39, 71 (1959):

> "One historic feature of equity is the molding of decrees to fit the requirements of particular cases . . . Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case."

Remedial flexibility is particularly important given the conflicting interests which must be balanced in Title VII litigation. Shortly after the Act became effective in 1965, it became apparent that the most complex and difficult problems of substantive law and remedies would involve the rights and status of the "incumbent Negro"—the black employee who was employed long before passage of Title VII under employment conditions that were often openly discriminatory.

Since the Act did not explicitly resolve the issue, it was left to the courts to decide whether Title VII proscribes racially neutral employment practices which are found to perpetuate discrimination occurring prior to passage of the Act.

The lower federal courts have now come to the view that Title VII does prohibit such racially neutral employment practices when they serve to retard the incumbent Negro's ability to assume his "rightful place" in his employer's and his union's operations. The resulting effort to change such racially neutral practices has focused upon some of the most

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author of the Note reported that a Justice Department official felt:

> "[J]udges may be more reluctant to find questionable, but long established practices a violation of the statute when large sums of back pay are involved." *Id.*

sensitive aspects of labor management relations—collectively bargained seniority systems, union hiring hall referral practices, and employer testing and promotion policies. This effort has frequently challenged, indeed jeopardized, private interests which have long been of paramount importance under federal labor laws—stability of a work force; the right of unions to participate through collective bargaining in the establishment of uniform rules to govern transfer, promotion, and the like; and the expectations of incumbent white employees who may suffer to the extent the incumbent Negro is benefitted.

In an area fraught with such conflicts, it is particularly important that courts of equity be left with full discretion to fashion the fairest and most effective relief in each particular case. As Chief Justice Burger said in *Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201 (1973):

> "[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable . . . Mr. Justice Douglas, speaking for the Court, has said,
>
> > 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' Hecht Co. v. Bowles, 321 U.S. 321, 329-330, (1944).
>
> "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interest have constitutional roots. [Footnote omitted]"

C. Back Pay Decisions Under Other Federal Labor Laws Are Not Dispositive.

Prior back pay cases under other federal labor laws do not support the back pay standard which Respondents would here impose. An employer who has violated the minimum wage or overtime provisions of the Fair Labor Standards Act, for example, has gained a financial advantage over competing employers who complied with the Act. Thus, a violator would be "enriched by the retention of money which it should have paid in wages" if back pay were not routinely awarded. *Shultz* v. *Mistletoe Express Serv., Inc.*, 434 F.2d 1267, 1272 (10th Cir. 1970). There is no such element of unjust enrichment in this case.

Under the National Labor Relations Act, the notion that back pay should be routinely awarded in cases under section 8(a)(3) has developed over the course of many years in the context of compensating an employee who was discharged, because the employee engaged in protected activities, by an employer motivated by a desire to discourage union membership.[10] The basis upon which such a back pay award may be computed is firmly established by the employee's prior performance of the job to which he is being reinstated.

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[10] Section 10(c) of the NLRA is significantly different from Section 706(g) of Title VII in that the word "shall" is used in the NLRA while the word "may" defines the scope of remedial authority under Title VII. (Albemarle Brief at 52, n. 52). Even under the mandatory language of the NLRA, this Court has recognized that "The remedy of back pay, it must be remembered, is entrusted to the [NLRB's] discretion; it is not mechanically compelled by the Act." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 198 (1941). But, even accepting respondents' assertion that back pay is "routinely" awarded by the NLRB, there is a substantial difference in the equities of the parties, and in the complexities of computing a back pay award, between a Title VII "rightful place" action such as this and a discharge case under the NLRA.

On the other hand, in the type of Title VII action at issue here, the violation is based upon maintenance of a seniority system or other neutral employment practice which has perpetuated pre-1965 discrimination. Under the Respondents' formula back pay will be awarded regardless of motivation. The calculation of such back pay would be an inherently speculative and monumental task. The essential basis for relief is that the employee-plaintiffs have never attained the employment level to which they are entitled, and in many cases it is alleged that plaintiffs have been unlawfully discouraged from even seeking advancement. Because of "the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment," *Phelps Dodge Corp.* v. *N.L.R.B., supra,* 313 U.S. at 198, the district court in computing such back pay must take into account, separately with respect to each member of every class, subjective or complex factors such as (a) the theoretical job performance capability of the plaintiff, (b) the job categories which he could have fulfilled, (c) the availability of such jobs at relevant times in his career, (d) the causal relation between the unlawful practice and the plaintiff's employment history, and (e) the reason for any failure by plaintiff to seek available promotions. There would be nothing "routine" about such inquiries. They would vary significantly with the particular employment practice and the individual employees involved.

D. This Case Illustrates The Inherently Speculative Nature Of Back Pay Claims.

Prior to trial, District Judge Dupree entered an order requiring Respondents to introduce at the trial any evidence respecting back pay for members of the class. (A. 51). Respondents then expanded their witness list and filed a

motion to refer the computation of back pay for individual class members to a special master. (A. 68). This motion was not granted by the District Court. After the District Court ruled that it would hear the issue of damages at trial, Albemarle sought by every means it could conceive to ascertain what the individual claims for damages were. These were never disclosed and never proved, although a trial was held thereon.

At the trial, Respondents introduced only general statistical evidence that the mill's Negro employees had earned lower average wages than whites. (Plaintiffs' Exhibit No. 10). Respondents introduced no evidence concerning the job qualifications of particular class members, no analysis of vacancies and work force patterns that would assist the trier of fact in determining the "rightful place" of any class member, and indeed no evidence as to what jobs each class member would have been willing to assume. In short, Respondents introduced no credible back pay evidence and there was nothing in the record to justify specific back pay awards by the District Court.

Given Respondents' failure to come forward with specific back pay evidence, and the procedural history of this case, the District Court would surely have been justified in concluding that a back pay claim had not been proven. Cf. *Lea* v. *Cone Mills, Inc.*, 438 F.2d 86 (4th Cir. 1971). Respondents' suggestion (Brief for Respondents at 67) that this case should be remanded to the District Court for consideration of individual back pay claims and that Albemarle would there have the burden of disproving such claims, the bases of which are unknown to it, is but a veiled effort by Respondents both to correct their total failure to prove such claims at trial. Courts should not grant relief in the absence of proof. Speculation and statistical averages are not the tools of equity. As one court has already noted in a Title VII

case, the two concepts of failure of proof, and discretionary denial of monetary relief, effectively merge in this type of situation. *United States* v. *United States Steel Corp., supra.*, 371 F. Supp. at 1061.

E. Conclusion

Even before passage of Title VII, Albemarle had already undertaken affirmatively to recruit black employees for its skilled jobs, and from 1965 on made efforts to encourage black incumbents to progress within the company. In 1968, Albemarle abolished the distinction between its two Extra Boards. Also in 1968, in direct response to the developing case law,[11] and in order to achieve unquestioned compliance with the law, Albemarle and the Union negotiated a new collective bargaining agreement providing for plant seniority as the relevant measure for promotion, and for "red-circling" of pay rates. (A. 292-3; A. 233). After unsuccessfully attempting, as early as September 1969, to bring this matter for trial, and recognizing the uncertainties created by more recent Title VII decisions, Albemarle prior to trial indicated its willingness to accept whatever changes the court saw fit to make with regard to those seniority provisions.[12]

When Albemarle at the start of trial indicated its willingness to consent to modification of its seniority provisions by the District Court, the result was the entry of a decree which necessarily declared that the prior seniority provisions had,

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[11] *Quarles* v. *Philip Morris*, 279 F. Supp. 505 (E.D. Va. 1968); *United States* v. *Local 189, Papermakers (Crown Zellerbach)*, 282 F. Supp. 39 (E.D. La. 1968; preliminary injunction); on the merits, 301 F. Supp. 906 (E.D. La.), *aff'd.* 416 F.2d 980 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970).

[12] It is of significance that the changes decreed by Judge Dupree were not major. Essentially, a transferred employee now retains his seniority even if he transfers back to his old line of progression.

to some extent, violated Title VII. From this technical finding of violation, entered so that the District Court could by consent order minor modifications of the seniority provisions, the Court of Appeals panel majority constructed a mandatory back pay rule entailing potentially massive financial consequences to employers regardless of their motivation. Adoption by this Court of such a mandatory and punitive back pay rule would insure vigorous defense by future Title VII defendants, of seniority or other racially neutral practices against the claim that they perpetuate past discrimination, and diminish the likelihood of entry of imaginative injunctive relief by consent and would greatly impede any settlement of Title VII actions. Neither the purpose nor the language of Title VII requires such a result.

CONCLUSION

For the reasons stated herein and for the reasons stated in Albemarle's Brief filed February 13, 1975 the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and that of the United States District Court for the Eastern District of Norh Carolina should be affirmed.

Respectfully submitted,

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